No. 80-6878

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORIGINAL COPY

MICHAEL GERALD VANDENBERG,

Appellant,

v.

STATE OF OREGON, ex rel JOHN VANDENBERG,

Appellee.

ON APPEAL FROM
THE OREGON COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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INDEX

	Page
MOTION TO DISMISS OR AFFIRM	1
QUESTIONS PRESENTED	1
STATUTES AND ADMINISTRATIVE RULES INVOLVED	2
STATEMENT OF THE CASE	7
MOTION TO DISMISS	11
1. This appeal was not timely filed in the United States Supreme Court	11
2. This appeal does not present a substantial federal question	15
A. The statutes appellant challenges have been repealed	15
B. Parham v. J. R., 442 US 584, 61 LEd2d 101 (1979) adequately covers the issues raised by the appeal	16
C. Res judicata and double jeopardy issues do not raise substantial federal questions	19
MOTION TO AFFIRM	21
CONCLUSION	23
APPENDIX	24

CITATIONS

Page

Cases

Addington v. Texas, 441 US 418, 99 SCt 1804, 60 LEd2d 323 (1979 20

Market Street Railway v. California Railroad Commission, 324 US 548 , 65 SCt 770 , 89 LEd 1171 (1945) . . . . . 13 ,14

O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2d 396 (1975) 18, 20

Parham v. J. R., 442 US 584, 99 SCt 2493, 61 LEd2d 101 (1979) 16, 18, 19, 20

State v. O'Neil, 274 Or 59, 545 P2d 97 (1975) . . . 17, 20

Timon v. Timon, 244 SW2d 990 (Tex.Ct.Civ.App. 1951) 20

Federal Statutes

28 USC 1257 (2) 10

Former Statutes

Ore.Rev.Stat. 427.015 . . . . . 15, 17

Ore.Rev.Stat. 427.054 17

Ore.Rev.Stat. 427.062 17

Current Statutes

Ore.Rev.Stat. 2.516 . . . . . 12, 13

Ore.Rev.Stat. 2.520 12

Ore.Rev.Stat. 427.020 15

Page

U. S. Supreme Court Rule

Rule 12.1 12

Oregon Appellate Rules

Rule 10.10 12

Rule 10.20 13

Oregon Administrative Rules

OAR 309-42-000 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-6878

MICHAEL GERALD VANDENBERG, Appellant,

v.

STATE OF OREGON, ex rel JOHN VANDENBERG, Appellee.

ON APPEAL FROM
THE OREGON COURT OF APPEALS

The appellee John Vandenberg respectfully moves to dismiss or affirm the judgment of the Oregon Court of Appeals in this case. Rule 16(1)(c) and (d).

QUESTIONS PRESENTED

1. Is an appeal timely filed in the United States Supreme Court which is filed more than 90 days after the issuance of a final judgment by the highest state appellate court having jurisdiction of the appeal?

2. Does appellant present a substantial federal question when the statutory procedure he challenges has been repealed?

3. Does appellant present a substantial federal question when the statutory procedure for civil commitment which he

challenges provides for impartial and detached professional evaluation of the individual to be committed, trial court review and representation by counsel, explicit statutory and administrative standards for determination of mental deficiency, and a requirement of evidence beyond a reasonable doubt?

4. Should a decision be affirmed which shows the challenged statutory commitment procedure meeting the due process requirements established by the United States Supreme Court and reaches this conclusion on uncontradicted evidence in the record of appellant's mental retardation and need for institutional care?

STATUTES AND ADMINISTRATIVE RULES INVOLVED

In addition to the constitutional provisions and statutes noted by appellant, appellee sets forth the following statutes:

Ore.Rev.Stat. 2.516

> "Except where original jurisdiction is conferred on the Supreme Court by the Constitution of Oregon or by statute, the Court of Appeals shall have exclusive jurisdiction of all appeals."

Ore.Rev.Stat. 2.520

> "Any party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for review within 30 days after the date of the decision, in such manner as provided by rules of the Supreme Court."

Former Ore.Rev.Stat. 427.035

"Upon receipt of an application as provided in ORS 427.025, the acceptable facility or institution or Fairview Hospital and Training Center, whichever has been requested to make the examination, shall schedule a date for the person alleged to be mentally deficient to be brought to the facility or institution or Fairview Hospital and Training Center for examination. The person shall not be kept in residence for a period longer than seven days."

Former Ore.Rev.Stat. 427.062

"(1) If the allegedly mentally deficient person, when brought before the court, requests the assistance of counsel to represent him at the proceedings provided for by ORS 427.015 to 427.059, the court shall give such person opportunity to obtain such legal counsel. If no such request is made by the allegedly mentally deficient person, his legal guardian, relative or friend may, in the order named, request assistance of legal counsel. If no request for legal counsel is made, the court may, at its discretion, appoint legal counsel.

(2) If the person is indigent, the court may provide by order for payment of an attorney fee by the county of residence of the allegedly mentally deficient person. The attorney fee shall be fixed by the court and shall be paid on the same basis as fees for attorneys appointed in criminal cases from the circuit court. In all cases such legal counsel shall be present at the hearing and examination and may examine all witnesses offering testimony, and otherwise represent such person.

(3) Where legal counsel is requested or provided, the court may continue the hearing for up to 72 hours after the request or appointment and may make such orders for the care and custody of the person during that period as it deems necessary."

Current Ore.Rev.Stat. 427.020

"(1) State training centers shall annually review the plan of care for each resident and certify the resident's eligibility and need for continued residential care and training and shall present each certification with clear and convincing justification for continued residential care and training to the State Training Center Review Board for review and action pursuant to this section. If the board does

not approve of the certification or, if the resident objects to continued residential care and training, the resident shall be released pursuant to ORS 427.300 or, if the division considers release not to be in the best interest of the resident, the superintendent of the state training center where the person is a resident shall initiate commitment proceedings pursuant to ORS 427.235 to 427.270, 427.280 and 427.285. The board may require the physical presence of any resident during the review. However, the board shall require the physical presence of each resident at least once every three years of residence in a state training center.

(2) The plan of care for each resident shall include, but not be limited to, the following:

(a) Current diagnosis;

(b) Level of functioning;

(c) Current habilitation and health programs in which the resident is participating;

(d) Statement as to continued eligibility and continued need for residential care;

(e) Statement of long-term and short-term goals for the resident; and

(f) Verification that the person has been advised of the facility's statement of rights and the policies governing his immediate living area.

(3) The state training center shall notify the resident orally. In addition, the resident, the resident's parent, guardian or person entitled to custody shall be notified by certified mail of the intent to certify the need for the resident's continued commitment. The notification shall include the following:

(a) Time, place and location of the hearing of the State Training Center Review Board;

(b) Explanation of the possible consequences of the proceedings; and

(c) Explanation of the resident's right to appear before the board on the resident's own behalf or to be represented at the proceeding by the resident's parent, guardian, the person entitled to custody or other person, including counsel, of the resident's choosing.

(4) In the event the resident, because of severe disability, is unable to receive and acknowledge the communication required by subsection (3) of this section, that fact shall be documented in the resident's record and conveyed to the board."

Oregon Rule of Appellate Procedure 10.10

"The petition for review in the Supreme Court shall serve as the petition for reconsideration in the Court of Appeals.

The Court of Appeals first will determine whether it will reconsider the case. Upon making that decision the court will enter an order evidencing such determination and transmit a copy of such order to the Supreme Court and to the parties of record.

If the Court of Appeals decides to reconsider, it may do so with or without oral argument and it may issue a modified or supplemental opinion or adhere to its former decision and opinion.

The petition for review to the Supreme Court will remain in abeyance until the Court of Appeals renders its decision and order on the petition.

....

If the Court of Appeals denies reconsideration, the Supreme Court will proceed to determine whether to grant review." ....

Oregon Rule of Appellate Procedure 10.20

"A party seeking to challenge an opinion of the Supreme Court shall do so by filing a petition for rehearing."

Appellant's quotation of OAR 309-42-000 is incomplete.

The full relevant text is:

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retarded and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division. This rule also prescribes a procedure for the release of certain residents from state institutions for the mentally retarded.

(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041)1) and carries out the provisions of ORS Chapter 427.

(3) Definitions. As used in this rule:

(a) "Division" means the Mental Health Division of the Department of Human Resources.

(b) "Examining authority" means the Diagnosis and Evaluation Service of the Mental Health Division or any facility designated by the Diagnosis and Evaluation Service to act as an examining authority for the purpose of this rule.

(c) "Mental retardation" means significantly subaverage general intellectural functioning existing

concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the "Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

(A) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.

(B) "Developmental period" means the period of time between birth and the 18th birthday.

(C) "Intellectual functioning" means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

(D) "Significantly subaverage" means a score on a test of intellectual functioning that is two ore more standard deviations below the mean for the test.

....

(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the Diagnosis and Evaluation Service of the Division shall determine that:

(a) An examining authority has found the person to be mentally retarded based upon the "Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social, and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70-79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments, or other such variables.

(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community. The Diagnosis and Evaluation Service may not make such a determination unless:

(A) Program and services needed by the person are available in a state institution for the mentally retarded;

(B) Space is available or may become available within a reasonable time in an appropriate unit of a state institution for the mentally retarded; and

(C) The Diagnosis and Evaluation Service has documented that the person cannot be maintained in the community because of severe behavioral or medical conditions, or that there are no appropriate community programs to meet the person's training, maintenance, or residential needs." ....

STATEMENT OF THE CASE

In his statement of the case, appellant states that the trial court made no finding that appellant was "unable to care for himself, nor did the evidence support such a finding." This is a complete distortion of what was found by the trial court judge.

The evidence showed that Michael Vandenberg had been diagnosed as mentally retarded by a physician, a psychiatrist, and two psychologists. He suffers from a large, progressive, infiltratin/lesion of the brain which manifests itself with grand mal epileptic seizures. These seizures threaten Michael Vandenberg with death if they are not controlled. They are controlled by daily dosages of phenobarbitol and dilantin.

Michael's intelligence level and his behavioral history indicate that he is not able to take care of his medical needs

on his own. Appellant's father, John Vandenberg, is a physician of long standing and testified regarding his son's medical condition. Dr. Vandenberg's testimony showed a long history of progressive retardation and epileptic seizures resulting from the brain lesion suffered by his son. The problems presented by the progressive deterioration resulting from the lesion eventually forced the appellant's parents to commit him. On at least three occasions prior to his eighteenth birthday, appellant was diagnosed as being retarded.

Since his commitment in 1976 appellant has shown no improvement in his physical capacities, the organic brain lesion continues to grow, and he has shown less capacity to accept responsibility for his medication as time went by. As a physician, Dr. Vandenberg testified that he believed his son did not have the ability to properly administer the medication to himself in the future. This diagnosis was confirmed by the chief medical officer of the institution where Michael was committed.

In 1978 when appellant reached the age of majority the institution was required by former Ore.Rev.Stat. 427.250 to evaluate him to determine whether he was in need of further residential treatment, training or education. Despite a divided opinion at the institution, the superintendent concluded that Michael should be released. This resulted in a hearing before a trial court at which the testimony was in dispute as

to whether appellant was retarded and in need of care. The trial judge stated that if he had the authority he would have "gone on and I would have certified and committed Michael." However, because the institution's administration had stated that Michael was not eligible for continuing services, the judge ruled that he was compelled to discharge appellant from the institution. He however stated specifically that he made no determination as to the mental condition of the appellant.

After this first hearing, appellant was released from the institution and was admitted to a group home. The testimony of the administrator of the group home detailed a series of behavioral problems suffered by appellant. The testimony showed that he eventually ran away from the group home and was found in the street having a grand mal seizure.

This last episode caused his father to file a petition to commit his son to Oregon's Mental Health Division. A precommitment physical and mental examination was carried out pursuant to court order. The report concluded that appellant has an intellectual disability which is commonly associated with organic brain damage, that his adaptive behavior is impaired and that he is mentally retarded and that he is eligible for continued services at the institution. The report was done with reference to the standards of the American Association of Mental Deficiency as set forth in the administrative rule of the Oregon State Mental Health Division, OAR 309-42-000.

In view of this latest analysis of appellant's mental condition and the evidence that he was unable to care for himself while outside the institution, the institution's administration admitted that it had been in error as to its previous conclusion about appellant's condition and stated that it supported his recommitment.

At the end of testimony at the second hearing the trial judge concluded that, based on all the testimony, he found that appellant was mentally retarded and should be committed until he had received sufficient training to go back into the community. The trial judge made his decision concluding that the evidence was "beyond a reasonable doubt."

Appellant presented no significant evidence to contradict the evidence of the appellee that Michael Vandenberg is mentally retarded and in need of institutional care.

The trial court's Order was issued on August 14, 1979. A Notice of Appeal to the Oregon Court of Appeals was filed on September 13, 1979. The Oregon Court of Appeals issued its decision on October 6, 1980. The decision affirmed the trial court's order of commitment.

On November 4, 1980 appellant filed a Petition for Review in the Oregon Supreme Court asking for review of the Court of Appeals decision. The Oregon Supreme Court denied the Petition for Review on February 4, 1981. The Oregon Court of Appeals issued its Judgment and Mandate affirming the trial court order on February 26, 1981.

Appellant filed a Motion for Rehearing in the Oregon Supreme Court on March 6, 1981, which the Supreme Court denied on March 17, 1981.

Appellant filed this Appeal on June 15, 1981.

Subsequent to the trial court's order the statutes under which appellant was committed were repealed. They were replaced by a new statutory scheme, current Ore.Rev.St. Chapter 27, which provides for annual review of appellant's case. If he should demand dismissal from the institution, he would have to be discharged unless a new commitment proceeding is started. Appellant has never demanded dismissal under the new statute.

MOTION TO DISMISS

1. This appeal was not timely filed in the United States Supreme Court.

A final judgment, for purposes of 28 USC §1257(2) has existed in this case since February 26, 1981. On that date, the Oregon Court of Appeals issued its Judgment and Mandate affirming the decision in the trial court. (It is important to note that appellant makes no mention of this judgment in his jurisdictional statement. A copy is provided in the Appendix to this Motion.) The mandate was issued after the Court of Appeals had rendered its opinion on October 6, 1980 and the Oregon Supreme Court had denied appellant's Petition for Review of the Court of Appeals' opinion on February 4, 1981.

The issuance of the Court of Appeals Judgment and Mandate on February 26, 1981 was the final step in the appeals process.

Pursuant to U. S. Supreme Court Rule 12.1, appellant had 90 days "after the entry of the judgment appealed from", i.e., until May 26, 1981, to file his appeal in the United States Supreme Court. This appeal was not filed until June 15, 1981, almost a month late.

The operative date from which appellant calculates the time for filing the appeal is March 17, 1981, when the Oregon Supreme Court denied appellant's Petition for Rehearing of its refusal to review the Court of Appeals decision. Under Oregon procedure, however, the judgment has already been entered. Appellant's application for reconsideration was a nullity.

Ore.Rev.Stat. 2.516 provides that the Oregon Court of Appeals shall have exclusive jurisdiction of all appeals. Ore. Rev.Stat. 2.520 provides that any party aggrieved by the decision of the Court of Appeals may petition the Supreme Court for review within 30 days after the day of the decision "in such manner as provided by the rules of the Supreme Court". Rule 10.10 of the Oregon Rules of Appellate Procedure provides that when a petition for review is filed, the Oregon Court of Appeals also automatically determines whether it will reconsider the case. The Petition for Review to the Supreme Court remains in abeyance until the Court of Appeals decides whether to reconsider.

In this case, appellant filed his Petition for Review on November 4, 1980. The Oregon Court of Appeals did not reconsider the decision. Thereafter, on February 4, 1981, the Oregon Supreme Court issued its order denying the Petition for Review.

On February 26, 1981 the Court of Appeals issued its Judgment and Mandate. It was not until 10 days later, March 6, 1981 when appellant filed a Petition for Rehearing in the Oregon Supreme Court.

There is no provision in Oregon practice for a rehearing of a Supreme Court order denying a petition for review. Oregon Appellate Rule 10.20 only provides for rehearing in the Supreme Court when a party seeks "to challenge an opinion of the Supreme Court." (emphasis added). Apparently, the Oregon Supreme Court treated appellant's Petition for Rehearing as if it was a petition for reconsideration and denied it.

The Oregon Supreme Court had earlier declined to take jurisdiction of the case by refusing to review the Court of Appeals opinion. Consequently, jurisdiction of the appeal remained with the Oregon Court of Appeals pursuant to Ore.Rev. Stat. 2.516. The Court of Appeals' issuance of its Judgment and Mandate prior to the application for rehearing in the Oregon Supreme Court brings the appeal to an end.

The United States Supreme Court's opinion in Market Street Railway Company v. California Railroad Commission, 324 US 548, 65 SCt 770,LEd 1171 (1945) supports appellee's position. There, the California Supreme Court had rendered an opinion on July 1, 1944, and denied a petition for review on July 27, 1944. A California procedure also provided that the judgment would become final 30 days after filing unless otherwise ordered prior to the expiration of said 30 day period. On August 1, 1944, the California Supreme Court certified the July 1 judgment.

The issue was when the California judgment was final for purpose of the statute which is the predecessor to 28 USC §2157. Justice Jackson stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a late power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, it is not a waiting lapse of time to become a judgment, it is merely subject to modification.
>
> ....our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30 day period.
>
> .....we hold that this judgment became final on denial of rehearing, ..." 324 US 551-552

Under the standard of Market Street Railway, the judgment was probably final in this case on February 4, 1981 when the Oregon Supreme Court denied the Petition for Review and was certainly final on February 26, 1981, when the Oregon Court of Appeals issued its Judgment and Mandate.[1] As of that point the Oregon Court of Appeals, the highest court in Oregon with jurisdiction of the appeal, had finally decided the federal question. The appellant was not able to destroy finality by subsequently asking the Oregon Supreme Court to reconsider the matter in a fashion not authorized by Oregon appellate procedure.

---

[1] Incidentally, this appeal should be treated as an appeal from the Oregon Court of Appeals which issued the judgment, not from the Oregon Supreme Court.

2. This appeal does not present a substantial federal question.

A. The statutes appellant challenges have been repealed.

Appellant is no longer held in the Oregon institution pursuant to the statute which he challenges on this appeal. He was originally committed pursuant to former Ore.Rev.Stat. 427.015 et seq. Those statutes were repealed in 1979 subsequent to the trial court's order, and a new procedure was adopted in Oregon for commitment of mentally retarded persons. The most important aspect of the new procedure is Ore.Rev.Stat. 427.020. Appellant remains in the Oregon institution pursuant to this statute which appellant does not challenge.

Ore.Rev.Stat. 427.020 provides for an annual review of a plan of care for each institutional resident that has been developed for his instruction and care. During each annual review the need for continued residential care and training must be established with "clear and convincing justification" to the State Training Center Review Board. If the Board does not approve of a certification for continued residential care and training, or, if the resident objects to continued residential care and training, the resident then will be released. However, if the Mental Health Division considers release not to be in the best interests of the resident, the superintendent of the state training center where the person is a resident must initiate commitment proceedings. The resident has the

right to counsel in a hearing before the State Training Center Review Board and also has a right to court appointed counsel in any commitment procedure begun by the superintendent of the institution where he resides.

At the time this appeal was commenced in the Oregon courts, the new procedure for annual review had not yet taken up appellant's case. Since the passage of the new statutory scheme, however, there has been opportunity for at least two annual reviews of appellant's condition. There is no record that appellant has ever objected to the State Training Center Review Board to his continued residence in the state institution. Should he ever object in the future, he would be automatically entitled to a new civil commitment hearing.

In effect, this appeal is moot, because appellant can be retained in the institution against his will only if a new civil commitment procedure is initiated by the Mental Health Division.

B. Parham v. J. R., 442 US 584, 61 LEd2d 101 (1979) adequately covers the issues raised by the appeal.

Appellant challenges the procedural standards for civil commitment in Oregon of mentally defective persons. In Parham, a Georgia statute allowed for a determination by the superintendent of each mental institution as to whether a child showed evidence of mental illness and should be admitted. There were no administrative regulations defining procedures the superintendents should use in making such determination. The Court

approved the Georgia procedure because it provided for determination of mental illness by professionals who are "neutral and detached." 61 LEd2d 127.

Oregon requires strict construction of its civil commitment statutes. State v. O'Neil, 274 Or 59, 55 P2d 97 (1976). Strict construction of Oregon's former civil commitment procedure at issue in this case shows that the procedure passes all due process tests.

Former Ore.Rev.Stat. 427.015 et seq, the statutes under which appellant was committed, did not exist in a vacuum, creating a vague and overbroad commitment procedure. The statutes were amplified by specific, detailed administrative rule. OAR 309-42-000. Nearly all of the evaluations of appellant showing that he is mentally retarded and has insufficient social adaptation were conducted with reference to the definitions and procedures set forth in this rule.

The administrative rule modifying the statute provides a detailed definition of mental retardation, which by its very nature requires that the commitment statutes by "strictly construed." Both former Ore.Rev.Stat. 427.015 and the rule look to whether the individual is in need of care. The rule provides for examination by a regularly constituted authority. Former Ore.Rev.Stat. 427.059 required court review of an examination finding the person mentally deficient and in need of care, and former Ore.Rev.Stat. 427.062 provided the individual with legal counsel. (Appellant had a hearing in this

case and was represented by counsel.) Hence, examination by "impartial and detached observers" was ensured, and the uncontrolled discretion that appellant fears did not exist.

The evidence at the trial court established that appellant is not only mentally retarded, but is unable to care for himself outside of the confines of the institution to which he has been committed. His principal problem, among many, is an inability to properly administer medication to himself which must be taken on a daily basis to prevent life-threatening grand mal seizures. In fact, his present commitment was mctivated in large part by his inability to adapt to life in a group home away from the institution, his running away, and eventually being found lying in a street suffering a seizure.

Oregon's formal civil commitment procedure met the standards of Parham v. J. R., supra, and also followed the fundamental rules of inquiry required in civil commitment procedures by O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2d 396 (1975). In O'Connor, the Court held that a state may not commit a mentally ill person without evidence that such a person is dangerous or is not capable of surviving safely in freedom by himself or without the help of other willing persons. In this case, the record was replete with evidence that appellant is unable to survive safely outside the confines of the institution where he has been committed.

Appellant attacks the materiality of Parham v. J. R.,

asserting that the decision dealt with a "voluntary" commitment. However, in that case, the party challenging Georgia procedure was a child who had been committed by his parents. The child had not entered the institution voluntarily. Appellant, as plaintiff in Parham, is a person who has been willingly committed by his parent in order to guarantee his care and survival.

In view of the fact that evidence has been found that appellant cannot survive outside the institution, is mentally retarded, and had legal counsel representing him at a hearing at which the evidence of mental retardation and necessity for commitment were fully litigated, the standards of Parham v. J. R. and O'Connor v. Donaldson, supra, have been met. Appellant presents no reason why those standards need additional amplification in this appeal.

C. Res judicata and double jeopardy issues do not raise substantial federal questions.

In the appeal to the Oregon Court of Appeals, appellant contended that the principals of double jeopardy and res judicata should apply. His complaint stemmed from a trial court hearing previous to the one which had resulted in his commitment. Appellant contended that the decision in the first court hearing to release him was res judicata as to any subsequent commitment procedure and the subsequent commitment procedure resulted in double jeopardy.

The previous court hearing in fact never resulted in a

judgment regarding appellant's mental deficiency. In fact, the trial judge specifically refrained from making a determination as to mental deficiency but released appellant because, at that time, the state institution did not feel appellant was in need of care. Under then existing procedure, the Court had no authority to make any further inquiry.

Res judicata does not present a federal constitutional question. While double jeopardy may present a federal constitutional question, it is an issue which is only applicable to criminal or contempt procedures and not to civil commitment procedures. Cf. State v. O'Neil, supra, 274 Or at 72.

In essence, appellant contends that once there has been one civil commitment proceeding, there can be no other. However, the general rule is as stated by the Texas Court of Civil Appeals in Timon v. Timon, 244 SW2d 990 (1951):

> "An adjudication regarding mental capacity at a particular time is conclusive on the question of a party's mental capacity at that time, but it is not conclusive as to matters not connected with the immediate purpose and scope of the proceeding, and although it may be admissible as evidence, it is not conclusive evidence of mental capacity at a subsequent time."

Originally, the institution thought that appellant could survive outside. The subsequent events proved that the administration was wrong and it so admitted in the second commitment hearing. To accept appellant's argument is to deny all future aid to retarded persons released from commitment by the state. The state must be allowed to recommit a retarded individual

when subsequent facts show that he should be committed for his own well being.

MOTION TO AFFIRM

The record establishes that Oregon's former civil commitment procedure met substantive due process requirements of the United States Supreme Court. The standards can be summarized as follows:

(a) The person being committed must be shown as dangerous or not capable of surviving safely in freedom by himself. O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2d 396 (1975);

(b) The procedure for commitment requires review by professionals who are "neutral and detached," and commitment must not occur through unbridled discretion. Parham v. J. R., 442 US 584, 99 SCt 2493, 61 LEd2d 101 (1979);

(c) The evidence used to commit the individual must be "clear and convincing". Addington v. Texas, 441 US 418, 99 SCt 1804, 60 LEd2d 323 (1979).

The evidence showed that Michael Vandenberg had been found mentally deficient by five professionals. The evidence, undisputed at the trial court level, was that he had been unable to reside outside of the institution safely and failed to take medication which was necessary to prevent life threatening grand mal seizures.

Appellant was committed pursuant to a procedure which required professional examination with reference to a carefully defined administrative rule setting forth the standards for determination of mental retardation and of ability to exist outside an institutional setting. The procedure also provided for formal court review of such findings with appellant represented by counsel.

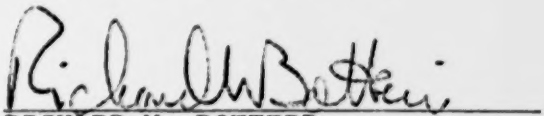
The trial judge found that appellant was retarded and needed institutional care "beyond a reasonable doubt." The Oregon Court of Appeals reviewed the record and confirmed the trial judge's decision. The evidence, not seriously contested by appellant either at trial or on appeal showed that the three necessary elements for commitment required by OAR 309-42-000(3)(c) had been found by evidence beyond a reasonable doubt: (1) a significantly sub-average performance on general intelligence tests, (2) a failure to meet the standards of personal independence and social responsibility expected for the age and cultural group of the individual, and (3) manifestation of these conditions during the time period before the subject's eighteenth birthday.

The Oregon Court of Appeals has adequately considered the federal questions in this case and has properly ruled to affirm the trial court's decision.

CONCLUSION

This appeal should be dismissed as not having been timely filed, or, in the alternative, for having failed to present a substantial federal question. In the further alternative, the decision of the Oregon Court of Appeals should be affirmed as having properly determined the federal questions presented.

Respectfully submitted,



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APPENDIX

FEB 27 1981

STATE OF OREGON

COURT OF APPEALS

COPY

In the Matter of Michael Gerald Vandenberg, Alleged to be Mentally Deficient.	)	JUDGMENT and MANDATE
STATE OF OREGON ex rel JOHN VANDENBERG,	)	Appeal from MARION County Circuit Court
Respondent,	)	No. 1158 CA 15533
v.	)	
MICHAEL GERALD VANDENBERG,	)	
Appellant.	)	

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on February 4, 1981:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

The cause is returned below for entry of judgment pursuant to law and the opinion and order of the court entered October 6, 1980.

ISSUED at Salem, Oregon:

STATE OF OREGON,)
County of Marion.)

I, ELIZABETH D. BELSHAW, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the originial, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

ELIZABETH D. BELSHAW
State Court Administrator

by _____
Deputy Administrator